INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statute involved 2

Statement 3

Argument 5

Conclusion 12

CITATIONS

Cases:

Alexander v. *"Americans United" Inc.*, 416 U.S. 752 6

"Americans United" Inc. v. *Walters*, 477 F. 2d 1169, reversed *sub nom. Alexander* v. *"Americans United"Inc.*, 416 U.S. 752 12

Board of Governors v. *Agnew*, 329 U.S. 441 11

Broadrick v. *Oklahoma*, 413 U.S. 601 11

Cammarano v. *United States*, 358 U.S. 498 8

Christian Echoes National Ministry, Inc. v. *United States*, 470 F. 2d 849, certiorari denied, 414 U.S. 864 10

Kuper v. *Commissioner*, 332 F. 2d 562 ..... 7, 11

League of Women Voters of U.S. v. *United States*, 180 F. Supp. 379 11

Liberty Nat. Bank & Trust Co. v. *United States*, 122 F. Supp. 759 11

Page

Marker v. *Shultz*, 485 F. 2d 1003 10

Seagram & Sons v. *Hostetter*, 384 U.S. 35 11

Seasongood v. *Commissioner*, 227 F. 2d 907 ..... 7, 11

Slee v. *Commissioner*, 42 F. 2d 184 ..... 6, 10

United States v. *Harriss*, 347 U.S. 612 12

United States Civil Service Commission v. *Letter Carriers*, 413 U.S. 548 12

Constitution, statutes and regulation:

United States Constitution:
First Amendment 8
Fifth Amendment 9

Act of September 16, 1919, c. 59, 41 Stat. 284, 285, Sec. 6 10

Act of July 23, 1947, c. 298, 61 Stat. 403, 406, Sec. 5 10

Act of August 6, 1956, c. 976, 70 Stat. 1052, 1055, Sec. 10 10

Act of August 26, 1958, Pub. L. 85-761, 72 Stat. 854, 858, Sec. 10 10

Act of August 27, 1958, Pub. L. 85-769, 72 Stat. 922, 926, Sec. 10 10

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365, 367, Sec. 201 10

Federal Regulation of Lobbying Act, 60 Stat. 839, *et seq.*, 2 U.S.C. 261-270 4

Page

Internal Revenue Code of 1954 (26 U.S.C. (1964 ed.)):
Sec. 41 .....
Sec. 162(e) 9
Sec. 170 ..... 1, 2, 8, 9
Sec. 170(a) 5
Sec. 170(c)(2)(B) 2, 5, 6
Sec. 170(c)(2)(D) 2, 5, 6
Sec. 501 10
Sec. 501(c)(3) 6
Sec. 501(c)(5) 10

Internal Revenue Code of 1954 (26 U.S.C. (1970 ed., Supp. II)), Sec. 501(c)(19) 10

Treasury Regulations on Foundation Excise Taxes:
Sec. 53.4945-2(d)(1) (26 C.F.R.) 8

Miscellaneous:

Caplin, *Limitations on Exempt Organizations: Politicai and Commercial Activities,* N.Y.U. Proceedings of the Eighth Biennial Conference on Charitable Foundations, 265 11

78 Cong. Rec. 5861 6

78 Cong. Rec. 5959 6

Hearings before the House Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, on H. Res. 217, Tax-Exempt Foundations, 83d Cong., 2d Sess., 423, 433-434 11

Hearings before Subcommittee of the House Committee on Appropriations, on Department of the Treasury, Executive Office of the President and Related Agencies Appropriations for 1968, 90th Cong., 1st Sess., 536 (February 17, 1967) 11

Page

Letter ruling to Sierra Club dated December 16, 1966, 1967 P-H Fed. Taxes, par. 54,664 11

Note, *Income Taxes—Deductions: In General—Etc.*, 80 Harv. L. Rev. 1793 (1967) 7

Note, *Tax Treatment of Lobbying Expenses and Contributions*, 67 Harv. L. Rev. 1408 (1954) .. 7

S. Rep. No. 92-1082, 92d Cong., 2d Sess. 10

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-445

ANTHONY HASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A 1a-26a) is reported at 500 F. 2d 1133. The findings of fact of the trial judge (Pet. App. B 27a-51a) are not officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 19, 1974. The petition for a writ of certiorari was filed on October 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly held that petitioner's contributions to the National Association of Railroad Passengers were not deductible as charitable contributions under Section 170 of the Internal Revenue Code

of 1954, because the Association's lobbying activities precluded it from qualifying as an eligible educational or charitable corporation under Section 170(c)(2)(B) or (D).

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C. (1964 ed.)):

Sec. 170. Charitable, etc., Contributions and Gifts.

* * * * *

(c) *Charitable Contribution Defined.*—

* * * * *

(2) A corporation, trust, or community chest, fund, or foundation—

* * * * *

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

* * * * *

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * * *

STATEMENT

Petitioner is a federal taxpayer and the organizer of the National Association of Railroad Passengers ("NARP"). In this refund suit, he seeks charitable contribution deductions for his contributions to that organization during 1967 and 1968 (Pet. App. B 27a-29a).

Pursuant to its Articles of Incorporation and By-Laws, NARP was organized "to act as a focal point for * * * programs and actions designed to encourage and promote the maintenance and improvement of passenger services, * * * including * * * the promotion of federal and state assistance to railroads for passenger service operations * * *" (Pet. App. B 32a). It was incorporated as a membership corporation, and by 1968 it had 3,000 members (Pet. App. B 31a). Petitioner's personal funds were the major source of NARP's income, for he contributed $41,-864.23, or 83.2 percent of its total expenditures in 1967, and $90,000, or 86.7 percent of its total expenditures in 1968 (Pet. App. B 27a, 28a, 29a).

From the inception of petitioner's railroad passenger service program, he recognized that attainment of the goal to preserve, improve and expand railroad passenger service would require political action at the national level (Pet. App. A 5a). As a result, petitioner in his capacity of executive director of NARP, testified four times before Congressional committees during 1967 and 1968, and made four written statements to such committees, in connection with legislation to amend the Interstate Commerce Act. Each appearance or submission was designed to attempt to influence pending legislation sought by NARP (Pet. App. A 5a). In 1967 and 1968, 10 percent of petitioner's time on NARP matters was devoted to activities that involved attempts to influence pending legislation or to secure legislation sought by NARP (Pet. App. B 29a).

In 1967, NARP engaged National Counsel Associates (NCA), a Washington consulting firm specializing in lobbying, as its representative before the executive branch and on legislative matters before Congress (Pet. App. A 5a). It outlined the goals of NCA representation by stating that NCA was to "represent us in legislative matters before the Congress, * * * [since] our objectives will require substantial legislative action." In its contract with petitioner's organization, NCA warranted that it "[possessed] expertise in the fields of public relations, public education and Congressional lobbying * * *" (Pet. App. B 40a).

During the last three quarters of 1968, petitioner, NARP, and National Counsel Associates each filed quarterly reports with the Clerk of the House of Representatives and the Secretary of the Senate, pursuant to the Federal Regulation of Lobbying Act, 60 Stat. 839, *et seq.*, 2 U.S.C. 261-270 (Pet. App. B 41a). The partner of National Counsel Associates who did the overwhelming majority of work on the NARP account, devoted 85 percent of his time to legislative matters.[1] These matters included assisting in the preparation of statements and testimony to Congressional committees, research and analysis of views of Congressmen and legislative publications, and personal presentations of NARP's views on pending legislation to members of Congress or their staffs (Pet. App. A 7a; Pet. App. B 42a-43a).[2] For

---

[1]Another partner, who performed only a small percentage of the work for NARP, performed considerable lobbying activities on its behalf (Pet. App. B 41a-42a).

[2]NCA's other services for NARP were incidental to the lobbying activities. For example, NCA assisted NARP in selecting a prestigious board of directors to further legislative goals, and met with personnel in the executive branch who were concerned with railroad legislation (Pet. App. A 7a, 19a).

these services, NARP paid a total of $9,299.27 in 1967 and $16,689.38 in 1968 (Pet. App. B 41a), which, together with related transportation and entertainment expenses, amounted to 20.5 percent of its total expenditures for 1967, and 19.27 percent for 1968 (Pet. App. B 41a, 50a).

The testimony and written statements on behalf of NARP did not represent nonpartisan analysis, study, or research, nor were they full and fair objective expositions that would enable the public to reach independent conclusions. Rather, they advocated a particular position and were partisan to the issue of the need to continue rail passenger service (Pet. App. A 6a). While technical advice and assistance was included in NARP's testimony and submissions, it was not submitted in response to independent requests from Congressional committees for such assistance (Pet. App. A 17a).

On these facts, the trial judge held that petitioner's contributions to NARP were not tax deductible, on the ground that NARP's lobbying activities precluded it from qualifying as an exclusively charitable or educational organization under Section 170(c)(2)(B) of the Code, or from complying with the "substantial" lobbying prohibition in Section 170(c)(2)(D). The Court of Claims adopted the trial judge's opinion *per curiam* (Pet. App. A 1a-26a).

ARGUMENT

1. Section 170(a) of the Internal Revenue Code of 1954 allows an income tax deduction for "charitable contribution[s]." However, Section 170(c)(2)(B) provides that a qualified charitable beneficiary must be "organized and operated exclusively for * * * charitable * * * or educational purposes * * *", and Section 170(c)(2)(D) provides that "no substantial part of the activities * * *

[of the charitable beneficiary may be] carrying on propaganda, or otherwise attempting, to influence legislation."[3]

The Court of Claims correctly held that petitioner's contributions to NARP were nondeductible because that organization did not qualify under either Section 170(c)(2)(B) or 170(c)(2)(D) (Pet. App. A 3a).

Although the tax laws contained no provisions prior to 1934 specifically prohibiting exempt charitable and educational organizations from engaging in lobbying activities, *Slee* v. *Commissioner*, 42 F. 2d 184 (C.A. 2), had held that an organization was not devoted exclusively to charitable or educational purposes if its lobbying was so general as to constitute a separate purpose. However, the court also stated that lobbying "incident" to the success of the exempt purposes—lobbying which is "mediate to the primary purpose"—would not detract from the organization's exclusively exempt purpose or preclude eligibility for tax exemption and tax deductible contributions (*id.* at 185).

Because of the difficulties of administering the *Slee* test, Congress added the specific lobbying proscription in 1934, which is now contained in Section 170(c)(2)(D).[4] That provision states that a donor cannot claim a charitable deduction for a contribution to an organization a "substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." Thus, Section 170(c)(2)(D) establishes a quantita-

---

[3]Essentially identical requirements govern tax-exempt status under Section 501(c)(3). See *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 754-755.

[4]See 78 Cong. Rec. 5959 (remarks of Sen. LaFollette); *id.*, at 5861 (remarks of Sen. Reed).

tive prohibition on lobbying, without regard to its character. See Note, *Tax Treatment of Lobbying Expenses and Contributions*, 67 Harv. L. Rev. 1408, 1412 (1954); Note, *Income Taxes—Deductions: In General—Etc.*, 80 Harv. L. Rev. 1793, 1794 (1967); *Kuper* v. *Commissioner*, 332 F. 2d 562 (C.A. 3). This substantiality test essentially requires weighing the quantum of lobbying activities against the exempt activities of the organization, which is to be determined on the basis of the facts and circumstances of each case. *Seasongood* v. *Commissioner*, 227 F. 2d 907, 912 (C.A. 6).

2. Petitioner challenges (Pet. 11), the correctness of the factual findings of the court below. He argues that the record does not support the conclusion that a "substantial part" of NARP's activities during the years in question was influencing legislation and attendant lobbying activities. But petitioner overlooks the undisputed fact that National Counsel Associates was a registered lobbying organization, that it warranted to NARP its lobbying expertise, and that National Counsel Associates was hired primarily to represent NARP before Congress on legislative matters. Indeed, petitioner himself stated that 85 percent of the time of the principal representative of National Counsel Associates who handled the NARP account was "spent on matters which could broadly be described as 'legislative' * * *."[5] There was accordingly ample evidence to support the finding that NARP's activities disqualified it from eligibility for tax-deductible contributions.

---

[5]See Plaintiff's Objections to Defendant's Requested Findings of Fact, p. 10, filed April 9, 1973, in the court below.

Petitioner further argues (Pet. 11-12) that the decision below erred in characterizing many of NARP's activities as influencing legislation rather than "nonpartisan analysis." This description is fully supported by the applicable provision in Treasury Regulations, Section 53.4945-2(d)(1)(ii), which defines "nonpartisan analysis" as—

> an independent and objective exposition of a particular subject matter * * *. Thus, "nonpartisan analysis, study, or research" may advocate a particular position or viewpoint *so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion.* [Emphasis added.]

However, as the court below found, NARP presented its information in a manner which would advance most forcefully its position that rail passenger service must be preserved. The court's conclusion that NARP's informational activities did not satisfy the italicized portion of the above-quoted regulation is well supported by the evidence (Pet. App. A 15a-16a).

3. Contrary to petitioner's additional contention (Pet. 13-15), the lobbying limitation in Section 170 does not violate his First Amendment right of freedom of speech. This Court unanimously rejected a similar contention 15 years ago in *Cammarano* v. *United States*, 358 U.S. 498, which upheld the prohibition set forth in Regulations under the 1939 Code of a business deduction for funds expended for "the promotion or defeat of legislation." In terms most appropriate to this case, the Court in *Cammarano* stated (*id.* at 513):

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for

those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "'aimed at the suppression of dangerous ideas'."

Nor does the lobbying proscription in Section 170 violate petitioner's right to equal protection under the Fifth Amendment. In so arguing, petitioner relies upon Section 162(e) of the Code, added in 1962, which permits businesses very limited deductions for certain expenses incurred in legislative appearances involving proposed measures of direct interest to the taxpayer. But as the court below explained (Pet. App. A 10a), the policy underlying the limited allowance of lobbying expenses in Section 162(e) was three-fold: (1) since expenses for direct lobbying related to income-producing activities, an accurate measure of net income supports some deduction; (2) similar expenses for administrative and judicial appearances were deductible; (3) as a matter of governmental policy, it was desirable for legislative bodies to have readily available information on the impact of proposed legislation on the trade or business of affected taxpayers.

These considerations do not apply to the activities of non-taxpaying exempt organizations or their donors. Indeed, Congress has a legitimate interest in preventing individuals from making tax-deductible contributions to finance lobbying activities through charities which are exempt from taxes. However, the prohibition is not absolute, for even such exempt organizations are allowed to

engage in insubstantial lobbying activities, as well as nonpartisan analysis of public issues.[6]

4. Finally, petitioner contends (Pet. 10) that the lobbying prohibitions on charities are not sufficiently specific and are thus unconstitutionally vague. In order to be fair to all types of organizations, however, both the Internal Revenue Service and the courts have refused to adopt a mere percentage test, or some other arbitrary standard. See *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F. 2d 849, 855 (C.A. 10), certiorari denied, 414 U.S. 864. Instead, the test used involves consideration of the amounts of time, effort, and money

---

[6]Petitioner's allegation (Pet. 15) that Section 501 unconstitutionally discriminates in favor of veterans and labor organizations, and against charities, because the former are not governed by any specific lobbying prohibition, is without merit. Labor unions are not eligible to receive tax deductible contributions. Unlike charitable and educational organizations, labor unions are exempt from taxation under Section 501(c)(5) primarily because their mutual character makes them unsuitable objects of taxation under a tax system that treats mutual associations differently from independent and integral entities such as corporations. See *Marker* v. *Shultz*, 485 F. 2d 1003 (C.A.D.C.). The exemption for veterans' organizations under Section 501(c)(19) is largely based on their mutual character. See S. Rep. No. 92-1082, 92d Cong., 2d Sess., pp. 1-3. In any event, labor and veterans' organizations are still subject to limitations on lobbying such as those set forth in *Slee, supra*. And several veterans' organizations are prohibited by statute from engaging in political activities. *E.g.*, Act of September 16, 1919, c. 59, 41 Stat. 284, 285, Sec. 6 (American Legion); Act of August 27, 1958, Pub. L. 85-769, 72 Stat. 922, 926, Sec. 10 (Blinded Veterans Association); Act of August 26, 1958, Pub. L. 85-761, 72 Stat. 854, 858, Sec. 10 (Military Order of the Purple Heart of the United States of America); Act of July 23, 1947, c. 298, 61 Stat. 403, 406, Sec. 5 (AMVETS). Numerous other non-profit organizations are expressly prohibited from engaging in political activities. *E.g.*, Act of August 6, 1956, c. 976, 70 Stat. 1052, 1055, Sec. 10 (Boys Clubs of America); Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365, 367, Sec. 201 (Corporation for Public Broadcasting).

devoted to lobbying, and whether participation in those activities is by the leadership, members, or outsiders;[7] the amount of money budgeted for political activities and the amount actually expended;[8] the number of programs and activities devoted to lobbying;[9] and whether the lobbying activities were sporadic, incidental or casual or, instead, regular, formal and purposeful.[10]

This Court has specifically held that similar statutory "substantial" guidelines are not unconstitutionally vague. See, *e.g.*, *Board of Governors* v. *Agnew*, 329 U.S. 441, and *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 48-49. The statutory term "substantial" is not "so vague that 'men of common intelligence must necessarily guess at its meaning' " (*Broadrick* v. *Oklahoma*, 413 U.S. 601, 607),

---

[7]Statement of Assistant Commissioner Norman A. Sugarman in Hearings before the House Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, on H. Res. 217, Tax-Exempt Foundations, 83d Cong., 2d Sess., 423, 433-434.

[8]*Seasongood* v. *Commissioner, supra; Kuper* v. *Commissioner, supra; League of Women Voters of U.S.* v. *United States*, 180 F. Supp. 379 (Ct. Cl.); Caplin, *Limitations on Exempt Organizations: Political and Commercial Activities*, N.Y.U. Proceedings of the Eighth Biennial Conference on Charitable Foundations, 265, 274.

[9]Statement of the Commissioner of Internal Revenue, Hearings before Subcommittee of the House Committee on Appropriations, on Department of Treasury, Executive Office of the President, and Related Agencies Appropriations for 1968, 90th Cong., 1st Sess. 536 (February 17, 1967).

[10]Letter ruling addressed to the Sierra Club dated December 16, 1966, 1967 P-H Fed. Taxes, par. 54,664. See, also, *Liberty Nat. Bank & Trust Co.* v. *United States*, 122 F. Supp. 759 (W.D. Ky.).

even though "marginal cases could be put where doubts might arise" (*United States Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 579, quoting *United States* v. *Harriss*, 347 U.S. 612, 618).[11]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

LEONARD J. HENZKE, JR.,
Attorney.

DECEMBER 1974.

---

[11]The constitutional rationale of the court of appeals in *"Americans United" Inc.* v. *Walters*, 477 F. 2d 1169 (C.A. D.C.), reversed on jurisdictional grounds *sub nom. Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, does not support petitioner here, for the constitutional issue the court discussed involved the impact of the "substantiality" test upon small exempt organizations. Moreover, contrary to petitioner's suggestion (Pet. 3, 21), the government did not argue in *"Americans United"* that review of the constitutional issue was appropriate but only that a refund suit could test the issue. Petitioner here has obtained his day in court on the constitutional issues and has lost; no further review is appropriate.